Supreme Court, U.S.
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No. 96-264

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

MATTHEW C. FULLER,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Montana

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The brief in opposition filed by Respondent erroneously contends that the petition for writ of certiorari should be denied because the state court relied upon an adequate and independent state ground; because the question presented has no basis in the Montana Supreme Court's decision; because the Montana Supreme Court did not err in its analysis of *Minnesota v. Murphy*; and because the Montana Court's decision promotes effective implementation of the state's policy requiring treatment of sex offenders.

I.

Recognizing that *Michigan v. Long*, 463 U.S. 1032 (1983), requires an affirmative statement that the state court is relying upon federal authority for the purpose of guidance only, Respondent contends that such a statement is unnecessary here because the Montana Supreme Court did not follow the decision in *Minnesota v. Murphy*, 465 U.S. 420 (1984). It is interesting to note that, later in his brief (Opp. Br. at 10-11), Respondent argues that the Montana Court correctly interpreted *Murphy* and simply applied it to these facts, so there is no need for this Court to grant review. Notwithstanding the inherent inconsistency between these two positions, Respondent is incorrect that the Montana Court's decision rests upon an adequate and independent state ground.

Nowhere in the opinion does the Montana Court affirmatively show that federal authority was merely considered persuasive as required by *Michigan v. Long*. In fact, the opinion states at one point that the Court's

holding is based on the Fifth Amendment, and no state law principles independent of the federal are discussed, let alone applied. (Pet. App. 17a.)

It is clear from the opinion that the Montana Supreme Court was compelled to reach its conclusion because of a fundamental misunderstanding of this Court's decision in *Minnesota v. Murphy*, not because of any independent rule of state constitutional law. The Montana Court correctly perceived the issue to be whether Respondent was subject to constitutionally cognizable compulsion which would render the Fifth Amendment privilege self-executing. The Court followed precisely the analysis in *Murphy* but then came to the erroneous conclusion that *Murphy* forbids any probation condition which has the incidental effect of infringing upon Fifth Amendment rights. While the parties disagree over the correctness of this analysis, there can be no legitimate question that the Montana Supreme Court viewed the federal and state constitutional privileges against self-incrimination as coterminous and relied on its misassessment of this Court's precedent to reach the result below.[1] Under these circumstances, and absent any statement that *Murphy* was simply persuasive authority, this Court has jurisdiction because the Montana court's decision, rather than being grounded independently in state law, was rooted firmly in the federal precedent.

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[1] This is, of course, consistent with the Montana court's prior decisions holding that the scope of the protection against compelled self-incrimination under article II, section 25 of the Montana Constitution, and that provided by the Fifth Amendment, are identical. *See, e.g., State v. Jackson*, 672 P.2d 255, 260 (Mont. 1983).

II.

Respondent's claim that the question presented has no basis in the Montana Supreme Court's decision is without merit. It is absolutely clear that Respondent accepted the benefits of his probationary status. Even were the voluntary character of his consent to the terms of the probation not apparent from the stipulated facts, the transcript of the original sentencing hearing reveals that Respondent did, in fact, agree to the probationary conditions, including the requirement that he honestly disclose his offending history. Respondent's counsel specifically acknowledged that his client would be required to make "full and complete disclosures" as a condition of probation, and represented to the state trial court that Respondent "intends to do that completely." Sent. Tr. at 197-98. Upon pronouncing sentence, the court advised Respondent that failure to abide by any one of the conditions imposed "will result in your being arrested and put in jail." Sent. Tr. at 201.

It is not fairly disputable, then, that Respondent voluntarily entered into the treatment program with the understanding that he would be required to make disclosures therein. The cases cited in the petition regarding choices put to a criminal defendant are therefore relevant, both factually and legally, to the question presented, and the question is properly before this Court.

III.

Respondent makes the same mistake when interpreting *Minnesota v. Murphy* as did the Montana Supreme Court and those other courts which have held that a

State, by requiring a probationer to disclose offending history for purposes of treatment as a condition of probation, creates the "classic penalty" situation rendering the Fifth Amendment privilege self-executing.

The so-called "penalty" cases which preceded *Murphy* make plain that a State may not compel testimony by threatening to inflict sanctions unless the constitutional privilege against self-incrimination is surrendered. In those cases, however, the threat was employed to secure abandonment of the privilege during an ongoing investigation into the individual's criminal culpability. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493 (1967) (threatened loss of employment); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (threatened termination of political office).

This Court in *Murphy* distinguished the penalty cases on the basis that "Murphy was not expressly informed . . . that an assertion of the privilege would result in the imposition of a penalty" and that "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." 465 U.S. at 438. The Montana Supreme Court erroneously construed this language to mean that the possibility of probation revocation for refusing to disclose honestly offending history as part of the treatment agreed upon as a condition of probation threatened probation revocation, and therefore created a "classic penalty" situation, for assertion of the privilege rather than for failure to comply with an otherwise perfectly

permissible condition of probation.[2] This interpretation unjustifiably expands the "penalty" exception developed in a line of cases involving individuals who had not been convicted of any crime, who were not under state penal supervision, and who were specifically threatened with sanctions if they did not *waive* their Fifth Amendment privilege and provide information that could assist the state in its criminal prosecution of these individuals. Respondent was not asked to waive that privilege with respect to the disclosures at issue; he remained free to assert the privilege and to assume the risk of probation revocation to the extent he might be deemed to have not complied with the condition that he truthfully disclose all offending history.

The Court's decision in *Murphy* must be interpreted in a similar vein. The *Murphy* Court was simply addressing the situation where the State uses the bald threat of probation revocation in retaliation for a probationer's assertion, or possible assertion, of the privilege against self-incrimination. Where, as in this case, acceptance of responsibility is required in order to qualify for lenient sentencing treatment, the specter of probation revocation serves valid penalogical interests favoring lenient treatment of convicted sex offenders who consent to participate in noninstitutional therapy in return for complying with certain rules – e.g., disclosure of any offending

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[2] As noted in the petition, this confusion is not unique. At least four other courts have similarly misconstrued *Murphy* in the context of sex offender treatment. See *State v. Gleason*, 576 A.2d 1246 (Vt. 1990); *State v. Eccles*, 877 P.2d 799 (Ariz. 1994); *Gyles v. State*, 901 P.2d 1143 (Alaska Ct. App. 1995); *Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991).

history – without which the very purpose of the therapy would be defeated. The Montana Supreme Court's reliance on *Murphy* for a contrary conclusion was incorrect.

IV.

Respondent claims that a therapist most likely would terminate a probationer who disclosed prior offenses during treatment and that public safety would be adequately protected by the ensuing revocation proceedings. There is no indication here that Respondent's disclosures that he had raped and molested three other girls were a factor in the revocation of his probation. In any event, even if a probationer was terminated from the program on the basis of his disclosures, the decision whether to seek probation revocation belongs to the prosecutor, not the therapist.

Respondent's position assumes that the public has no interest in prosecuting an offender who reveals prior offenses, no matter how numerous or heinous, as long as the probationer is returned to prison to serve the remaining portion of his sentence. This result, however, is contrary to *Murphy* where the Court implicitly recognized the public interest served by prosecuting a probationer who revealed a previously unknown murder during sex offender treatment.

Petitioner does not assert, as Respondent implies, that everyone who enters a therapy program will be charged on the basis of admissions made to his therapist or automatically have his probation revoked upon assertion of the privilege against self-incrimination. (Opp. Br.

at 17.) Again, probation revocation is not premised on the privilege's assertion; the prosecutor may choose to seek revocation based on the therapist's determination that an integral condition of the therapy has not been complied with. There is, moreover, no assurance that every admission with respect to uncharged crimes will be used for purposes of an independent prosecution. Prosecution decisions presumably will be made with reference to factors like the nature or severity of the uncharged conduct and the perceived threat to public safety. The probationer, no less than the therapist or prosecutor, often may be in a quandary as to the appropriate course of action, but that quandary is not the result of being placed in the constitutionally proscribed position of having a penalty imposed for asserting the right against self-incrimination. It is the result of having embarked knowingly and freely on a course that required certain disclosures as the quid pro quo for the very real and immediate benefit of conditional freedom.

CONCLUSION

For these reasons and those set out in the petition, the Petitioner requests that a writ of certiorari issue herein.

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